Calendar No. 422

99TH CONGRESS
1st Session

SENATE

REPORT
99-192

SETTLING UNRESOLVED CLAIMS RELATING TO CERTAIN ALLOTTED INDIAN LANDS ON THE WHITE EARTH INDIAN RESERVATION, TO REMOVE CLOUDS FROM THE TITLES TO CERTAIN LANDS, AND FOR OTHER PURPOSES

NOVEMBER 19 (legislative day, NOVEMBER 18), 1985.—Ordered to be printed

---

Mr. ANDREWS, from the Select Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 1396]

The Select Committee on Indian Affairs, to which was referred the bill (S. 1396) to settle unresolved claims relating to certain allotted Indian lands on the White Earth Indian Reservation, to remove clouds from the titles to certain lands, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

The amendment is an amendment in the nature of a substitute.

BACKGROUND AND PURPOSE

S. 1396 was introduced by Senator Boschwitz, for himself, and Senator Durenberger on June 27, 1985. The purpose of the bill is to settle unresolved claims relating to certain allotted Indian lands on the White Earth Indian Reservation and to remove clouds from the titles to approximately 110,000 acres of land situated within the reservation.

The bill would retroactively ratify land transactions by which individual Indian allottees became divested of ownership of their trust allotment. This ratification would become effective only after (1) the State of Minnesota has entered into an agreement with the Secretary of the Interior providing for transfer of 10,000 acres of land from the State to the Secretary for the benefit of White Earth Band of Chippewa Indians; (2) the state appropriates $500,000 for the purpose of assisting in the implementation of this Act; and, (3) the Congress has appropriated $6.6 million for an economic development fund for the Band. The bill provides for compensation or allottees of their heirs to be provided in accordance with a legisla-

71-010 O

S413-8

tive formula, and such claim will be treated as a final judgment, award, or compromise settlement against the United States under the provisions of Section 1304 of Title 31, United States Code. Compensation for loss of an allotment or interest shall be the fair market value of the land as of the date the land passed out of Indian ownership, less any compensation actually received, plus interest compounded annually at 5 per centum from the date of loss.

The proposed ratification would not effect any action in any court (State or federal) to recover title or damages relating to land transactions proposed to be ratified if a complaint for such title and damages is filed in court within 180 days from the date of enactment of this Act or before Congress appropriates the funds authorized in this legislation and the other conditions spelled out above have been met, whichever is later in time. In addition, if an heir, allottes, or any other person entitled to compensation under this legislation elects, he or she may bring an action in the U.S. Claims Court to challenge the constitutional adequacy of the compensation determination of the Secretary as it relates to any particular claim. In either case, if the claimant files for title in a court of law or if the claimant elects to sue the United States in the Claims Court, such claimant will be barred from receiving compensation from the settlement fund established by this bill.

HISTORICAL BACKGROUND

Kappler's "Indian Affairs, Laws and Treaties" (Vol. II) lists six treaties between the United States and the Chippewa Indians of the Mississippi, the last and most important as it relates to this legislation being the Treaty of March 19, 1867 (16 Stat. 719); Kappler's, Vol. II, pg. 974). Under this Treaty, the Chippewas ceded to the United States certain lands within the State of Minnesota which had been found to be unsuitable for agriculture in exchange for several promises, including the promise that the White Earth reservation area be set aside for the Minnesota Chippewas "in order to provide a suitable farming region for the said bands." The reservation was to consist of 36 townships and under the terms of the treaty when "any Indian, of the bands parties hereto, either male or female, shall have 10 acres of land under cultivation, such Indian shall be entitled to receive * * * forty acres of land * * * and whenever such Indian shall have an additional 10 acres under cultivation, he shall or she shall * * * be entitled to * * * an additional 40 acres, and so on, until the full amount of 160 acres may have been certified to any one Indian * * *."

On March 18, 1879, President Rutherford Hayes issued an Executive Order formally setting apart the White Earth reservation as a reservation for Indian purposes. (E.O., March 18, 1879, reprinted in: Vol. I, Kappler's, p. 853). As described, the reservation encompassed 36 townships with approximately 854,000 acres of land. (1983 Hearing, data supplied by Office of the Attorney General, State of Minnesota, pg. 650. Other documents in possession of the Committee indicate 837,120 acres—paper, Virginia Rogers; and, 825,000 acres—memorandum, Marianna Schulstad, Field Solicitor, Department of the Interior).

At the time the 1867 Treaty was negotiated, it was the intent of the U.S. Treaty Commissioners and those favoring the establishment of the reservation to consolidate the the Chippewa Indians then living in Minnesota and North Dakota on the White Earth reservation. The boundaries of the reservation were drawn so as to encompass good lands for farming and grazing, quality pine timberland, and areas providing bountiful fish and game resources, wild rice and other natural seasonal resources.

By 1867, the Mississippi Chippewa community had become infused with a separate but related group whose ancestral admixture was comprised of Chippewa Indian and French-Canadian stock. This group, frequently referred to as "half breeds" or "mixed bloods," was associated with fur trading activity along the Mississippi. Even at the time of the 1867 treaty relations between the traditional or "full blood" Chippewa and the French-Canadian "mixed bloods" was strained. Article 4 of the Treaty specifically provided that "no part of the annuities provided for in this or any former treaty with the Chippewas of the Mississippi bands shall be paid to any half-breed or mixed-blood, except those who actually live with their people upon one of the reservations belonging to the Chippewa Indians." (II Kappler, p. 975).

The role of these "mixed bloods" and the future of the White Earth reservation is discussed in some detail in an article by Melissa Meyer published in Journal of the West in 1984. (See Melissa Meyer, "Warehousers and Sharks: Chippewa Leadership and Political Factionalism on the White Earth Reservation, 1907–1920," Journal of the West, Vol. 23, No. 3, July, 1984). As noted by this commentator, one of the principal hereditary Chippewa chiefs, Hole-in-the Day, strongly opposed inclusion of any "French-Canadian mixed bloods" in the relocation at White Earth. Within a year after the 1867 Treaty had been signed, Hole-in-the-Day was found murdered. Ultimately, the "Lake Superior or French-Canadian mixed bloods" did join in the removal to White Earth where they received allotments and established farms and businesses.

From the standpoint of the United States and the Indian agents, these mixed bloods were considered the more progressive element on the reservation, and this group came to dominate the political structure on the reservation. The distinction between "mixed blood" and "full blood" from the Indian perspective stemmed less from genetic composition than from economic and social attitudes. Politically, the "mixed bloods" supported popularly elected political institutions—the "full bloods" supported hereditary chiefdoms; economically the "mixed bloods" supported individualization of property and removal of restrictions—"full bloods" protested their people had no understanding of white man's laws and would be exposed to loss of property; socially the "full blood" or traditional faction asserted that "a person born of white and Indian blood raised in the custom and costume of the white is a white mixed blood, a person born of white and Indian raised in the custom and costume of the Indian is an Indian mixed blood." (Meyer, p. 40). As matters unfolded, it is clear that many of the "white" mixed blood faction played significant roles in the fraudulent activities that brought about divestiture of title from the Indians on the White Earth reservation,

the "mixed bloods" often playing the role of purchasing agent or broker of property owned by full-bloods.

In 1887, Congress enacted the General Allotment Act or Dawes Act, establishing a national policy of allotting tribal lands in severalty among the members of tribes occupying a reservation. The ultimate objective was the break-up of Indian reservations and elimination of the governments of the tribes with consequent assimilation of the Indians into the dominant culture. In 1889, in furtherance of this policy, Congress enacted the Nelson Act (Act of Jan. 14, 1889; 25 Stat. 642, I Kappler, p. 301) establishing a Commission to negotiate for cession of Chippewa lands in the State of Minnesota other than the Red Lake and White Earth reservations and providing for the allotment of lands on both the Red Lake and White Earth Reservations. For unrelated reasons, the Red Lake reservation was never allotted. As to both Red Lake and White Earth reservations, the Commission was authorized and directed to negotiate a cession and relinquishment of "so much of these two reservations as in the judgment of said commission is not required to make and fill the allotments" required by the Act. From the authority of this provision, four townships on the northeast border of the White Earth reservation containing primarily timber stands were determined excess to the allotment needs of the Indians of White Earth and the townships were removed from the reservation, thus reducing the total reservation acreage to 762,000 acres. (See Hearing, p. 50).

The process of selection of tracts by individual Indians on the White Earth reservation began in the early 1890's, and the first trust patents were issued in 1902. In accordance with the terms of the General Allotment Act of 1887, each trust patent issued to an individual Indian guaranteed that the United States would hold title to the land in trust for the Indian or his heirs for a period of 25 years from the date of issuance, and that no taxes or assessments could be imposed during that period, nor would any conveyance or encumbrance of the land be valid without approval of the Secretary of the Interior. Most White Earth trust patents were issued in 1902, 1907, or 1908.

In 1904, Congress enacted legislation to increase the size of each allotment to the Indians on the White Earth reservation to 160 acres. This Act, (Act of April 28, 1904; 33 Stat. 539; III Kappler, p. 98) known as the Steenerson Act, opened the door for allotment of timber lands which had previously been withheld from allotment. Originally, pine lands had been excluded from allotment because their greater value prevented an equitable apportionment of lands in terms of value. (See Meyer, Op, Cit.) According to this same commentator, the continued strain between the traditional Chippewa leadership and the mixed blood community was so manifest it was necessary for the Agent in charge to form two lines, one traditional and the other mixed blood, to alternately allocate the additional allotments. The provision in this 1904 Act calling for an allotment of 160 acres for each eligible individual Indian exceeded the amount of land remaining within the White Earth reservation leading to the contention today that the four townships on the northeast boundary were never "excess" to the needs of the reservation.

A second Act enacted in 1904 authorized the Indians of the White Earth Reservation to sell, with Secretarial consent, standing timber on their allotments separate and apart from sale of the actual allotment. At this time, the laws of the State of Minnesota prohibited any one company or person from owning more than 5,000 acres of timeberland. The authorization for the separate sale of timber coupled with the additional allotment of timberland to the Indians of White Earth opened the door for circumventing this state law. Over the next two years, efforts were made to sell off Indian timber interests through bidding processes, but questionable practices of the timber companies led the Secretary of the Interior to cancel the bids.

In 1906, Congress enacted the Burke Act, amending the General Allotment Act to permit the Secretary of the Interior to issue to an Indian allottee a patent in fee, conferring outright ownership and legal title, before the expiration of the 25 year trust period established by the original Act, provided that the Secretary first determined that the Indian was "competent and capable of managing his or her affairs." (34 Stat. 182, 183). Upon issuance of such a fee patent all restrictions as to sale, encumbrance or taxation were removed.

In contrast to the Burke Act, Senator Clapp in this same year succeeded in adding an amendment to the Appropriation Act for the Indian Department which simply removed restrictions from any allotments previously made or thereafter made to "mixed bloods" on the White Earth reservation, and in line with the Burke Act, authorized the Secretary of the Interior to approve sales by "full bloods" with their consent. The Clapp amendment was re-enacted in the 1907 Appropriation Act for the Indian Department in almost identical terms and reads as follows:

> That all restrictions as to sale, incumbrance, or taxation for allotments within the White Earth reservation in the State of Minnesota, heretofore or hereafter held by adult mixed-blood Indians, are hereby removed, and the trust deeds heretofore or hereafter executed by the Department for such allotments are hereby declared to pass the title in fee simple, or such mixed bloods upon application shall be entitled to receive a patent in fee simple for such allotments; and as to full bloods, such restrictions shall be removed when the Secretary of the Interior is satisfied that adult full-blood Indians are competent to handle their own affairs, and in such case the Secretary of the Interior shall issue to such Indian allottee a patent in fee simple upon application.

The Clapp Act provided no definition for the term "mixed bloods" and the record of debates in the Congress provided no insight.

The extent to which pressure had built for access to Indian lands and timber at White Earth and the extent to which advance preparations had been made is reflected by the fact that during the first three weeks the Clapp Act was in effect, Becker County alone recorded over 250 mortgages of Indian lands. (See Melissa Meyer, Unprinted Doctoral Thesis, Ch. 5, pg. 238). Three timber companies particularly were noted for their activity on the reservation: Nich-

ols-Chisolm Company purchased approximately 150 million board feet; Park Rapids Company acquired 38 million board feet; and the Wild Rice Company acquired 20 million board feet. Prices paid for the timber were below those established for the 1905 sale which had brought forth a Secretarial cancellation. (Meyer, Thesis, p. 242).

In 1908, Warren K. Moorhead, recently appointed by Theodore Roosevelt to the Board of Indian Commissioners, visited the White Earth reservation to gain first hand information as to what was taking place. He collected 117 affidavits representing over a million dollars worth of property taken from the Indians and, due to perceived threats from interested parties, felt compelled to depart with this evidence by means of subterfuge and with an armed escort. Upon representing this evidence in Washington, the Board of Indian Commissioners directed a further investigation in 1909.

In 1909, Moorhead returned in the company of Edward B. Linnen, a regular experienced Indian Office inspector. In a report later submitted to a Congressional investigating committee, Moorhead and Linnen found that fully 90 percent of the lands allotted to full-blood Indians had been sold or mortgaged, and fully 80 percent . . . of the lands on the reservation had passed into the hands of private ownership. (Meyer Thesis, p. 247, citing the Report form the Committee on Expenditures in the Interior Department, presented by Mr. James Graham, Chmn. Jan. 16, 1913, Rept. No. 1333, 82nd Cong., 3d Sess.).

To skirt the fact that no mechanism had been established to determine "mixed blood" status, many of the mortgages or documents of sale had attached affidavits from the Indian owner attesting to his or her mixed blood status, often the signature consisting only of the Indian's thumb print. Similar affidavits conveniently concealed the fact that a number of applications had been received from minors ineligible to sell.

James Graham, Chairman of the House Committee on Expenditures in the Interior Department, issued a report setting forth the results of the Committee's investigation over a two year period. The conclusions of the Committee were damning not only for the activity of private parties in their transactions with the Indians, but also of Federal authorities and their failure to protect the Indians. Minority views were also filed questioning some of the conclusions of the Graham Report. (House Report No. 1333, 82nd Cong., 3rd Sess., January 16, 1913).

In addition to collecting evidence of improper and fraudulent activity, Moorehead and Linnen conducted extensive interviews with the elders among the Indians over a three month period and compiled a roll of the "full blood" Indians at White Earth. Since a number of Indians were missing at the time this roll was complied, they recommended that this roll be supplemented the following year when the annuities were dispersed. By this time, the Department Justice had also taken an interest and in 1910 Special Attorney Marsden C. Burch, with the assistance of Special Agent John H. Hinton, compiled an exhaustive roll constructed from review of Indian Department records and personal interviews and setting forth each individual's status to the sixteenth fraction of white blood. (Meyer, Thesis, p. 249-250).

Burch's primary concern during this investigation was with "full bloods" and minor "mixed bloods," two categories of the Indian allottees who were not authorized by the Clapp Act to sell their lands without first obtaining Secretarial consent. Within a year, he had filed over 1,000 suits covering 142,000 acres—$2 million in land and $1.75 million in timber. (Meyer, Thesis, p. 249).

Not surprisingly, outside interests found grounds for complaint at the Hinton roll. A move to establish a new commission to create a roll for White Earth gained momentum and in 1913 Congress adopted an amendment to the Appropriation Act for the Indian Department calling for establishment of a two member Commission. One member, Gordon Cain, was appointed at the recommendation of the Department of Justice; the other, Ransom J. Powell, an attorney for many of the defendants including the Nichols-Chisolm Lumber Company, was appointed as the second Commissioner.

In 1914, the first of the White Earth cases, *United States* v. *First National Bank,* reached the Supreme Court calling for an interpretation of the term "mixed blood" as set forth in the Clapp Act. The Department of Justice asserted the view that the term meant only those persons who were of one-half or more white, a view which was not supported by the Commissioner of Indian Affairs. Ransom J. Powell appeared for the defendant-appellees, arguing the position that the words of the statute were clear and that any admixture of white blood to the Indian constituted a "mixed blood" for purposes of the Act. Of the three Indians involved, one had some white blood, derived by a remote ancestor, but not to exceed 1/32nd; one was 1/16th white; and, the third 1/8th white. The U.S. District Court had held that Congress intended competency to be the test and came to the conclusion that an Indian having an admixture of 1/8th white blood might come within the term, but that beyond that the white blood would not effect the capacity of the Indian to manage his own affairs. The Circuit Court of Appeals reversed, holding that any Indian having an identifiable mixture of other than Indian blood, however small, is a "mixed blood" within the meaning of the Act. The Supreme Court affirmed the ruling of the Circuit Court. *United States* v. *First National Bank,* 234 U.S. 245 (1914).

In 1917, two other White Earth cases reached the Supreme Court. In *United States* v. *Waller,* the issue presented was the standing of the United States to represent mixed blood Indians of the White Earth reservation in cases in which actual fraud could be shown. These Indians, while holding their allotment in fee patent status, nevertheless remained members of the tribe and were recognized by the Indian Department as eligible for the benefits and protections afforded by Indian law. The second case, *Dickson* v. *Luck Land Company,* 242 U.S. 371 (1917), had defined the rights concerning lands patented in fee to an adult mixed blood Chippewa under the Clapp Act. In the *Luck* case, the Court held that when an Indian allottee is given a patent in fee for his allotment, he shall have the benefit of and be subject to the laws, both civil and criminal, of the State. Among the laws to which the allottee became subject, and to the benefit of which he became entitled, under this enactment were those governing the transfer of real property, fixing the age of majority and declaring the disability of

minors. (242 U.S. 371, 375). Citing this language from *Luck*, the *Waller* decision held that the United States was without capacity to bring an action on behalf of a mixed blood Indian involving title to fee patent land despite his or her membership in the tribe.

The holdings in *First National Bank, Luck Land Company,* and *Waller* had a devastating impact on the cases originally brought by the Department of Justice. In the meantime, the activity of the Roll Commission authorized by the 1913 legislation had bogged down with difficulty in ascertaining genealogical evidence sufficient to meet the test for legal sufficiency. In 1917, Congress amended its 1913 legislation, providing that the roll should only record "full blood" or "mixed blood" status, rather than fractions thereof. Two physical anthropologists were then employed, Dr. Ales Hrdlicka of the Smithsonian Institution and Dr. Albert Jenks of the University of Minnesota, who proceeded to tour the White Earth reservation, taking head measurements and examining hair, skin, and other physical characteristics of the Indian people. After examining 696 of approximately 800 "full bloods," the two men felt sure enough of their observations to testify as to the status of individuals. These activities contributed directly to the development of the 1920 Blood Roll approved by the U.S. District court in that year, as required by the Act.

As a result of the above judicial decision and the research conducted under the auspices of the Commission, and due to the passage of time, the new attorney for the Justice Department, Francis Kearful, concluded that the pending cases should be resolved through out of court settlements. Counsel for the defendants agreed with Mr. Kearful that genuine full-bloods (presumably as determined by the Roll Commission) should have their lands restored to them by decree of court; mixed-bloods competent to sell (presumably any adult mixed blood) should have their cases dismissed; and, in all other cases, which constituted the greater number, defendants should pay into the Indian office the difference between the actual value of their original payments and the fair value of the property at the time of sale, as it should be agreed upon, with interest at 6% up to the date of settlement. Parties not content with the arrangement were left to litigate through their own counsel.

One of the most authoritative accounts of the history of the controversy at White Earth appears in a work by William Watts Folwell, "A History of Minnesota." Folwell notes that the number of suits filed in court up to September 1, 1915, was 1,609, but there were many additional cases listed in the Attorney General's office. Altogether, the number of controversies must have reached twenty-five hundred and they may have amounted to 3,000. (Folwell, Vol. 4, p. 294.) The whole amount paid by lumber companies in settlement of 132 suits was something over $70,000, but the costs of litigation to the United States and to the defendants was estimated to be $500,000 by each side.

According to the Meyer Thesis, the 1920 Blood Roll enrolled 5,173 allottees of the White Earth reservation. Only 104 "full bloods" of 126 identified by Hrdlicka survived to be recorded. The commissioners agreed that 282 allottees who had died should be included as "full bloods." A total of 408 "full bloods" were thus iden-

tified. (Meyer, Thesis, p. 262). According to documents submitted by researchers studying statute of limitations claims on the White Earth reservation, the 1920 Roll resulted in 740 persons who had been certified as "full bloods" on the 1910 Hinton Roll being removed from that category and listed on the 1920 Roll as "mixed bloods."

Folwell quotes a member of the Board of Indian Commissioners who was present at the final approval of the rolls in November, 1920, as writing that "the records of White Earth Indian exploitation by unscrupulous white men, some of them prominent citizens and business men, aided by their hired mixed-blood agents, constitute some of the blackset pages in the history of the American Indian." (Folwell, Vol. 4, p. 295.)

ANALYSIS OF CLAIMS

The approximately 825,000 acres of land which comprise the White Earth Chippewa Reservation in Mahnomen, Becker and Clearwater Counties, Minnesota, were originally wholly owned by several bands of Chippewa Indiana. Through a series of treaties culminating in 1867, the United States agreed to reserve and preserve this land for the use and benefit of the Chippewas.

In 1889, Congress under the Nelson Act, directed the Secretary of the Interior to divide up the 36 townships of land reserved by the 1867 treaty and to provide a parcel to each living Indian. The process of selection of tracts by individual Indians began in the early 1890's, and the first trust patents were issued in 1902. In accordance with the terms of the General Allotment Act of 1887, each trust patent issued to an individual Indian guaranteed that the United States would hold title to the land in trust for the Indian or his heirs for a period of 25 years from the date of issuance, and that no taxes or assessments could be imposed during that period, nor would any conveyance or encumbrance of the land be valid without approval of the Secretary of the Interior. Most White Earth trust patents were issued in 1902, 1907, or 1908.

An Executive Order signed in 1927 had the effect of extending, for an additional 10 years, all trust periods which would have expired in 1927 on White Earth allotments, with the exception of a small number of tracts specifically listed. Similar Orders extended all trust periods at White Earth which would have expired in 1932 or 1933. With the passage of the Indian Reorganization Act in 1934, all trust periods then in existence, including those which had been extended by Executive Order, were extended indefinitely.

To this point, the legal history of the allotment process at White Earth does not differ substantially from that of a number of other reservations. This history, however, was made immeasurably more complicated by the passage by Congress of what is commonly called the Clapp amendment in 1906. That statute purported to provide that adult mixed blood White Earth Chippewas took their allotments in fee simple rather than subject to any trust. But the language of the provision, even though fairly straightforward, cannot be taken at face value. A number of judicial decisions such as *Minnesota* v. *Zay Zah* (1977) have dealt with its effect. Taken together, they have held that the General Allotment Act, and the issuance of

trust patents thereunder, created vested rights in the Indians—rights which Congress could not unilaterally abrogate without compensation.

Among the vested rights, which Congress did not terminate by the Clapp Amendment, were the rights to the continuance of the trust relationship and the right to immunity from taxation for the original 25 year period plus applicable extensions, unless the adult mixed blood or his heirs took some affirmative action evidencing a desire to terminate the trust, such as selling or mortgaging the land. The Solicitor, in 1979, has also ruled that, since the Clapp Amendment did not terminate the trust relationship, it is the Department of the Interior, and not state or local probate courts, which has jurisdiction and responsibility to determine the heirs of deceased White Earth Chippewas and to distribute their trust estates.

Given this background, and because of the variety of ways in which title problems were initially created as to White Earth allotments, the following is a list of categories of potential claims identified by the Interior Department Field Solicitor in Minneapolis, Minnesota, which White Earth allottees or their heirs may have.

(1) Allotments to full or mixed blood Chippewas, which were never mortgaged or sold by the allottee, which purportedly were forfeited by the county for nonpayment of taxes, and title to which, therefore, is now claimed by the State, or a county, or both. It is estimated that approximately 150 such tracts fall in this category constituting about 9,700 acres.

(2) Allotments to full or mixed blood Chippewas, which were never mortgaged or sold, which were forfeited for non-payment of taxes by the county and which were later purportedly sold by the State or county to private parties or the United States. It is estimated that the total number of tracts which fall in this category is 50, constituting approximately 3,500 acres.

(3) Allotments to full or mixed blood Chippewas who died after the allotment was made, and whose estate was admitted to probate in the county court without such court having jurisdiction. Some of these allotments may have been distributed to heirs who would not have been the rightful heirs if the estatae had been probated by the Department of the Interior. Some of these allotments were distributed to minors for whom a county probate court appointed guardians and authorized and approved sale of such allotment by such minor without having jurisdiction to do so. Potential claims in this category cover an estimated 40 tracts constituting about 3,500 acres.

While a few tracts in this category may subsequently have been declared forfeited for nonpayment of taxes, the bulk of them continue to be held in private hands by parties who purchased in good faith from persons authorized by county probate court to sell the lands.

(4) Allotments to mixed blood Chippewas which were sold by the allottees, prior to their having attained the age of 21 and without the approval by the Department of the Interior. An estimated 290 tracts fall in this category, with a total acreage of 33,400. The vast majority of these lands are still held by private parties.

(5) Allotments to full or mixed blood Chippewas, title to which passed by operation of law (with or without a formal heirship determination by the Department of the Interior and a distribution of the trust estate), to more than one heir and where one, or more heirs, being an adult mixed blood or a non-Indian, rightfully sold his or heir interest in the land, leaving an undivided fractional interest in other heirs.

The unsold fractional interest can now form the basis of a potential claim to an undivided fractional interest in the land if such interest was ultimately declared forfeited by the county for nonpayment of taxes.

Presently, some of these tax-forfeited fractional interest or held by the state or county and some were sold to third parties. Some of these fractional interests were probated and given to heirs by county courts lacking jurisdiction. Finally, some of these interests were inherited by minors and then sold with the approval of a county court lacking jurisdiction.

It is estimated 140 tracts could be involved with a total acreage affected by such claims of approximately 11,000.

(6) Allotments to full or mixed blood Chippewas, which were never mortgaged or sold, and were never purportedly forfeited for nonpayments of taxes, but which nevertheless have been used, occupied, and conveyed by others over a sufficient period of time so that a claim by adverse possession has been made against the Indians' title. An estimated 20 tracts covering about 2,000 acres fall in this category.

In her memorandum, the Field Solicitor noted that approximately 1,175 allotments had been submitted as being subject to possible claims. Two-hundred seventy-five (275) had been closed and approximately 500 remained open awaiting additional documentation. She estimated 60 percent of those or about 300 allotments would constitute potential claims.

In testimony before this Committee on November 17, 1983, the Office of the Attorney General of the State of Minnesota submitted data regarding these claims reflecting that there were 948 land files which the Bureau of Indian Affairs considered "active" and that these claims affected a total of 100,110 acres in three counties. The breakdown of claim categories provided by the State differs in descriptive terms from that used by the Field Solicitor and is set forth here as provided by the State:

(a) Unapproved trust land sales (files)	526
(b) Improperly tax forfeited lands (files)	222
(c) Improper probates (files)	107
(d) Forced fee patents (files)	88
(e) Improper school or swamp land designation (files)	2
(f) Improper fee patent cancellations (files)	2
(g) Secretarial transfers (files)	1
Total files	948
Total acreage	100,110

S. 1396 provides a separate description of transactions covered by the bill and covers the claims noted by the Field Solicitor and the State.

LEGISLATIVE HISTORY

S. 1396 was introduced by Senator Boschwitz, for himself, and Senator Durenberger on June 27, 1985, and was referred to the Select Committee on Indian Affairs for consideration. A hearing was held by the Select Committee on September 11, 1985. A companion bill, H.R. 2678, was introduced in the House of Representatives by Mr. Stangeland on June 5, 1985, and was referred to the House Committee on Interior and Insular Affairs. A hearing was held by that Committee on September 10, 1985. The Interior and Insular Affairs Committee has not yet yet acted upon the House bill.

In the 98th Congress, legislation similar to S. 1396 was introduced in both Houses of Congress, S. 885 was then introduced by Senator Durenberger, for himself, and Senator Boschwitz on March 22, 1983, and was referred to the Select Committee for consideration. A hearing was held on November 17, 1983. The House Committee on Interior and Insular Affairs also held hearings on a companion bill, H.R. 2246, on November 18, 1983. No action was taken by either Committee in the 98th Congress.

COMMITTEE RECOMMENDATIONS AND TABULATION OF VOTE

The Select Committee on Indian Affairs, in open business session on November 7, 1985, with a quorum present, by a vote of five in favor and four opposed, recommends the Senate pass S. 1396, as amended. Senators voting in favor were Senators Andrews, Goldwater, Gorton, Murkowski, and Abdnor; those opposed were Senators Melcher, Burdick, DeConcini and Inouye.

COMMITTEE AMENDMENTS

The Committee recommends an amendment in the nature of a substitute.

SECTION-BY-SECTION ANALYSIS

Section 1—Title

The title of the bill is the "White Earth Reservation Land Settlement Act of 1985." The purpose of the bill is to settle unresolved claims relating to certain allotted Indian lands on the White Earth Indian Reservation, to remove clouds from the titles to certain lands, and for other purposes.

Section 2—Findings

This section outlines the reasons why this legislation is necessary, including the need to resolve a substantial number of land claims which have arisen due to questionable land transfers, a desire to prevent lengthy and expensive litigation, and to provide a settlement of such land claims that is fair and equitable to all affected Indians and non-Indians.

Section 3—Definitions

This section defines the terms which are significant to the legislation, such as "full blood," "mixed blood," tax forfeited," "trust period," "heir," "transfer," and "allotment."

Section 4—Categories of claims

The bill is intended to provide monetary compensation for unlawful transfers of Indian land and apply to the following types of land transactions involving trust allotments on the White Earth Indian Reservation.

(1) allotments or interests in allotments which were tax forfeited while the allotments were still held in trust;

(2) allotments or interests in allotments which were sold by minors while the allotments were still held in trust;

(3) allotments or interests in allotments which were sold by full blood Chippewa Indians without approval by the Secretary of Interior while the allotments were still held in trust;

(4) allotments or interests in allotments which were sold or distributed pursuant to state court probate proceedings while the allotments were still held in trust;

(5) allotments or interests in allotments which were sold by guardians appointed by state courts on behalf of full or mixed blood Indians; and

(6) interests in allotments which were sold while the allotments were still held in trust, but which did not have the approval of every Indian who held an interest in a particular allotment.

There are certain types of land transactions involving trust allotments on the White Earth Reservation which are recognized as being valid. As such, the provisions of this bill explicitly do not apply to the following types of land transactions:

(1) the sale of allotments or interests in allotments which have been validated by federal courts;

(2) the tax forfeiture of allotments or interests in allotments after the expiration of the trust period;

(3) the sale of allotments or interests in allotments at any time by an adult mixed blood Chippewa; and

(4) the tax forfeiture of allotments or interests in allotments after the date on which the tax exemption was declared by a federal court to have expired.

Section 5—Special situations

This section deals with several special situations which require validation:

(1) The determination of heirs by state courts in Minnesota prior to May 9, 1979, are affirmed unless the Secretary performs a separate determination of heirs and notifies the proper county recording office within six months after the bill is enacted;

(2) Several tribal members applied for allotments, but died before the final selection of the allotments were processed. This section ratifies the selection of allotments and provides that the decedent's interests escheat or revert to the White

Earth Band which shall be compensated in the manner provided in the bill; and

(3) Land that was allotted originally by treaty in 1867 was reallotted pursuant to a federal law enacted in 1889. This section validates the reallotment of such land.

Section 6—Procedure for extinguishing claims and clearing titles

This section provides that land claims will be extinguished, titles will be cleared, and landowners will be immune from suit as soon as the following conditions occur and the Secretary publishes a certification in the Federal Register that these conditions have occurred:

(1) The State of Minnesota transfers 10,000 acres of land to the Band;

(2) the State of Minnesota appropriates $500,000 to help the United States with the computer and technical assistance necessary to implement the bill; and

(3) the United States appropriates $6.6 million for the Band's Economic Development Fund.

Until the Secretary publishes this certification, titles will not be cleared and lawsuits to re-claim title will not be prohibited.

A statute of limitations is built into the legislation. This section extinguishes the claims that might exist due to the land transfers described in Section 4(a), 4(b), and 5(c), but establishes a statute of limitations for claims of either the allottees, heirs, or the Band. Unless the allottees or heirs file their actions for title not later than 180 days from enactment of the Act, or prior to the date the Secretary publishes the certification described above, whichever is later, they are forever barred from seeking title to the land. The White Earth Band is barred from filing for title to any land upon enactment of the bill, unless the Secretary fails to publish the certification described above within two years from the date the bill is enacted. In the event anyone files an action for titles to the land, such persons are prevented from every receiving compensation as provided for in the bill.

This section also allows those persons seeking compensation under the bill to challenge the constitutional adequacy of the compensation determined by the Secretary, so long as the challenge is filed within 180 days of the issuance of the notice of the Secretary's compensation determination. In addition, if a person challenges the adequacy of the compensation pursuant to this section, such person is barred from receiving any compensation under the bill.

Section 7—Identification of land claims

This section requires the Secretary to investigate and determine which White Earth allotments fall within the disputed categories of land transactions outlined in Sections 4(a), 4(b), or 5(c). The Scecretary shall publish his initial determination in the Federal Register and several newspapers in Minnesota within six months from enactment of the bill in order to allow the public to identify additional lands which might fall within the disputed categories of land transactions. Such additions must be submitted to the Secretary within one year from the date of publication in the Federal Regis-

ter of the first list. Based upon these submissions, the Secretary shall publish a second list of allotments.

The Secretary's determination to include or not include an allotment on the first list may challenged judically through the Administrative Procedure Act so long as the challenge is filed within 90 days from the date of publication of the first list. A similar challenge is allowed once the second list of allotments is published.

Section 8—Compensation determination provisions

This section provides that compensation will be given to each heir or allottee who has been identified as losing an interest in land due to the clearing of titles and extinguishment of claims outlined in the bill. The compensation formula shall be the fair market value of the land as of the date of the disputed transaction, less compensation actually received, plus interest compounded annually at 5 percent until the date of enactment of the bill, and at market rates thereafter.

Compensation actually received will not be subtracted in cases of actual fraud or where land was sold without approval by any Indian under 18 years of age. In addition, compensation shall not be given to any person or heir where both an allotment was received pursuant to state court probate and where it is determined by the Secretary that such person or heir was not entitled to inherit the allotment.

This section sets out the process for Secretary notification to allottees and heirs of the compensation determination and distribution, and provides that the Secretary shall give written notice to those heirs or allottees whose addresses can be found by reasonable and diligent efforts. All others shall receive notice through publication in the Federal Register.

This section allows judicial review through the Administrative Procedure Act of the Secretary's determination of the appropriate amount of compensation so long as the review process is initiated within six months from the Secretary's notification to the allottees and heirs.

Section 9—Heirship determination

This section requires the Secretary to determine the heirs entitled to compensation under this bill, except to the extent that such heirs have already been determined and acknowledged pursuant to state court probates as provided in section 5(a) of this bill.

Section 10—Conditions necessary to implement act

This section provides that claims are not extinguished and titles are not cleared until and unless the contributions and appropriations required from the State of Minnesota and the United States are made. This includes (1) the transfer of land from the State to the United States in trust for the Band, including a provision to ensure continued access to the public across the lands transferred; (2) an appropriation of $500,000 from the state to the United States for the computer and technical assistance necessary to implement the bill; and (3) an appropriation for the United States of $6.6 million to the Band.

Section 11—Jurisdiction

This section provides that nothing in the bill is intended to alter the jurisdiction of either the State, the White Earth Band, or the United States within the exterior boundaries of the White Earth Reservation.

Section 12—Economic development fund

This section established the White Earth Economic Development Fund ~~to~~ be held in trust by the United States for the Band. The Fund is to include the monies received by the Band pursuant to this bill, such as the $6.6 million appropriated by the United States and the compensation that reverts to the Tribe due to the inability of the Secretary to locate allottees or heirs which are entitled to compensation under the bill.

Section 13—State land transfer

This section provides the legal authority for the State to transfer certain lands to the United States in trust for the Band.

Section 14—Time limits for Secretary

This section sets forth a five year time limit for the Secretary to accomplish the requirements and objectives of the bill.

Section 15—Appropriations

This section authorizes the appropriations needed to comply with the provisions of the bill.

Section 16—Exemption from taxation

This section provides that the monies distributed under the bill shall not be subject to state or federal income taxes or be considered as income for purposes of determining eligibility for certain public welfare programs.

Section 17—Land exchange

This section allows for land exchanges within the exterior boundaries of the White Earth Reservation if the Band and the State or the United States desire a land exchange.

Section 18—Trust status

This section provides that land acquired by the Band pursuant to this bill or acquired funds referred to in the bill shall be held in trust by the United States for the Band.

COST AND BUDGETARY CONSIDERATIONS

The cost estimate for S. 1396, as amended, as provided by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, November 18, 1985.

Hon. MARK ANDREWS,
Chairman, Select Committee on Indian Affairs, U.S. Senate, Hart Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the attached revised cost estimate for S. 1396, the White Earth Reservation Land Settlement Act of 1985.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,
Sincerely,

RUDOLPH G. PENNER.

CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

1. Bill number—S. 1396.

2. Bill title—White Earth Reservation Land Settlement Act of 1985.

3. Bill status—As amended and ordered reported by the Senate Select Committee on Indian Affairs on November 7, 1985.

4. Bill purpose—This bill would retroactively ratify certain land transactions by which individual Indian allotees divested ownership of their trust allotments or interests in those allotments. This ratification would be contingent upon the transfer of 10,000 acres of land by the State of Minnesota to the United States to be held in trust for the White Earth Band of Chippewa Indians; the appropriation of $500,000 by the State of Minnesota to assist in the implementation of this legislation; and appropriation of $6.6 million by the federal government for an economic development fund for the Band. The federal government would also pay all claims recognized under this bill.

5. Estimated cost to the Federal Government—

[By fiscal years, in millions of dollars]

	1986	1987	1988	1989	1990
Estimated authorization level/budget authority		18.6	4.0	1.0	1.0
Estimated outlays		13.6	7.3	2.5	1.0

The costs of this bill fall within budget functions 450 and 800.

Basis of estimate—For the purposes of this estimate, it is assumed that all sums authorized will be appropriated and that enactment will occur in time to allow the inclusion of funds in fiscal year 1987 Bureau of Indian Affairs (BIA) appropriations.

The bill states that compensation for the loss of an allotment or interest in an allotment shall be the fair market value of the land interest at the time ownership was transferred, less any compensation received, plus interest compounded annually at five percent until the date of enactment of this act. After that date, interest will accrue at the general rate earned by Department of the Interior funds. The BIA estimated in 1983 that claims under this act, in-

cluding accrued interest, would total about $10.4 million. These claims would be paid by the Department of the Treasury into the White Earth Settlement Fund, from which they would be distributed by the Secretary of the Interior. This estimate assumes that all claims would be paid into the fund in fiscal years 1987 and 1988, by which time they are estimated to total approximately $12 million. Payment of such claims would not require appropriation action.

The bill also authorizes the appropriation of $6.6 million for White Earth economic development. This sum is assumed to be appropriated in fiscal year 1987 and is disbursed according to historical patterns of similar federal programs.

In 1983, the BIA estimated administrative, investigative, and probate costs associated with a similar bill to be $5.5 million. This estimate assumes that the necessary funding, assumed to be about $6 million, will be provided for these expenses over the lifetime of the program.

6. Estimated cost to State and local governments—This bill would require an appropriation of $500,000 by the State of Minnesota and a transfer of 10,000 acres of land to the United States to be held in trust for the White Earth Band. While the final decision concerning the lands to be transferred has not been made, the Minnesota Department of Natural Resources has estimated the value to the state of 10,000 acres to be approximately $6 million.

7. Estimate comparison—None.

8. Previous CBO estimate—The estimate supersedes the previous CBO estimate of November 13, 1985, which incorrectly identified the fund into which claims would be paid by the Treasury. The estimated costs are the same in both estimates.

9. Estimate prepared by—Paul M. DiNardo.

10. Estimate approved by—James L. Blum, Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. S. 1396, as amended, will involve the processing of a large number of individual claims of Indian allottees or heirs of the White Earth Band of Chippewa Indians. The regulatory impact will be minimal.

EXECUTIVE COMMUNICATIONS

The Committee received the following letter from the Department of Justice at the time of mark-up of the bill. The only other communication received is in the form of testimony offered by the Department of the Interior at the Committee hearing.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS,
Washington, DC, November 6, 1985.

Hon. MARK ANDREWS,
Chairman, Select Committee on Indian Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice on S. 1396, a bill to settle unresolved land claims on the White Earth Indian Reservation.

The Department has had the opportunity to review and analyze several predecessor versions of this bill. On May 16, 1985, we reported on S. 885 to the Office of Management and Budget and noted potential constitutional and technical issues with that bill. Our detailed review of S. 1396 indicates, however, that these problems have been rectified and that it does not appear to contain any legal or constitutional infirmities. Whether this legislation should be enacted involves questions as to which the Department of Justice defers to the Department of Interior.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

PHILLIP D. BRADY,
Acting Assistant Attorney General.

STATEMENT OF TIM VOLLMANN, ASSOCIATE SOLICITOR, DIVISION OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, BEFORE THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS, U.S. SENATE, ON S. 1396, A BILL "TO SETTLE UNRESOLVED CLAIMS RELATING TO CERTAIN ALLOTTED LANDS ON THE WHITE EARTH INDIAN RESERVATION, TO REMOVE CLOUDS FROM THE TITLES TO CERTAIN LANDS, AND FOR OTHER PURPOSES"

September 11, 1985

Mr. Chairman, I am pleased to present the views of the Department of the Interior on S. 1396, the "White Earth Reservation Land Settlement Act of 1985."

S. 1396 seeks to solve a particularly difficult and complex situation on the White Earth Reservation in Minnesota. Over 100,000 acres of land on that reservation, now owned primarily by bona fide purchasers, are subject to potential Indian claims. S. 1396 would provide compensation to the Indian allottees or their heirs while at the same time removing the cloud on the titles to the affected lands by confirming and ratifying the past transactions giving rise to these potential claims. The types of claims to be resolved by S. 1396 fall within the following major categories:

(1) Allotments to full or mixed-blood Chippewas which land was never sold or mortgaged by the allottee or the heirs of the allottee and which were forfeited to the county for nonpayment of taxes. Title is now claimed by the State of Minnesota, the county, or a third person;

(2) Allotments which were sold by minors, fullbloods, or members of other tribes without secretarial approval; and

(3) Allotments to full or mixed-blood Chippewas who died after the allotment was issued and whose estates were admitted to probate in the county court without the court have the necessary jurisdiction.

The Department supports a legislative solution to the White Earth land claims as was indicated in Judge Richardson's September 18, 1984 report to the committee on S. 885, a bill quite similar to S. 1396. The Department's position is essentially reflected in that report with some important modifications which I will discuss momentarily.

While all of the types of claims enumerated in S. 1396 have resulted in clouded titles, only the tax-forfeiture claims have been judicially determined to be meritorious. The majority of other White Earth claims, while clouding titles, may be of questionable legal merit. Recently, the U.S. Court of Appeals for the Eighth Circuit, without reaching the merits, cast doubt on our legal position that the Interior Department, not the State courts, had the responsibility to probate the estates of adult mixed-blood Chippewas after the Clapp amendment. *Spaeth* v. *U.S. Secretary of the Interior, et al.,* No. 84-5039 MN and 84-5054 MN (8th Cir. Decided March 15, 1985).

S. 1396 places the entire burden of implementing the bill on the Department of the Interior. Likewise, the entire cost of administering S. 1396 must be borne by the Department, except for a contribution of $500,000 from the State of Minnesota for technical and computer assistance. The State would, however, transfer 10,000 acres of land within the White Earth reservation to the United States to be held in trust for the White Earth Band.

Because of the passage of time, the administrative tasks of probating estates and determining and locating heirs of White Earth allottees will be an enormous and costly undertaking, requiring many years to complete. The difficulty of these tasks is compounded by the fact that many of the heirs who would be entitled to compensation under the bill's legislative scheme are scattered throughout the country and are not members of the White Earth Band or any other Indian tribe. In many cases, the compensation to heirs may be minimal.

For the foregoing reasons, we believe that S. 1396 needs to be revised in the following respects to reduce the enormous administrative burdens and costs.

(1) Provide for a procedure whereby the heirs would file applications with the Department for compensation in lieu of pursuing litigation within 2 years from the date regulations are promulgated. The compensation to be based on the formula contained in S. 1396.

(2) Adopt the findings and the orders of the State probate courts as those of the Department of the Interior. Provide a 3-year period in which an heir could appeal to the Secretary challenging a State probate. If it is determined that an heirship determination was in error, such heir would be entitled to compensation based on the formula contained in S. 1396.

(3) Require that all claims for title and/or trespass damages be filed with the court within 1 year of the date that the State

transfers 10,000 acres of land to the United States in trust for the White Earth Band.

Since the *ZAY ZAH* decision in 1977, the Indian community at White Earth has been well aware of these potential claims. Despite this fact, only one action had been filed by an Indian heir seeking to recover a former White Earth allotment. *Gabo* v. *County of Mahnomen*, No. C-85-117 (Dist. Ct. Minn., Filed June 5, 1985). We believe the paucity of litigation is due, in large measure, to the fact that in many cases, the interest to be recovered by any one heir is too small to warrant the expense of litigation. As a result, we believe a 1-year limitations period would be adequate and appropriate. This will simply and finally eliminate clouds on the titles and extinguish the claims by operation of law without raising questions regarding the underlying legality of the extinguishment.

We believe that heirs should file applications for compensation rather than requiring the Department of the Interior to expend enormous sums of money to determine and locate heirs scattered from one end of the country to the other. The Department, of course, should bear the responsibility for making a reasonable effort to provide notice to the heirs of this administrative claims process. The application process would not be burdensome but only require the applicant to establish his relationship to a White Earth allottee whose name appears on the published list of allottees.

Adopting the findings and orders of the State probate courts will result in considerable savings to the Government. A Federal Indian probate requires the application of the State laws of descent and distribution. Regardless of whether the estate of a White Earth allottee was probated by a State court or the Interior Department, the applicable law is essentially the same. Thus, for the Department to re-probate estates of Indians probated by State courts would not be costly but would often be pointless. We recommend that an heir be able to appeal to the Secretary challenging a State probate if he or she believed that an heirship determination was in error. This provision would afford Indian heirs sufficient protections from possible judicial error without requiring the Department to review and re-probate every State probate of a deceased White Earth Allottee.

There are a number of other provisions in S. 1396 with which we disagree. We are particularly concerned with the provision to establish an economic development and tribal government fund for the White Earth Band, which has no established claim to such compensation. We would be pleased to work with the committee to resolve these objections.

This concludes my prepared statement. I am ready to answer questions you may have.

○